



Texas A&M University School of Law
Texas A&M Law Scholarship

Faculty Scholarship

12-1998

Review of Jesse Dukeminier and James E. Krier, Property (4th Edition 1998)

Andrew P. Morriss

Texas A&M University School of Law, amorriss@law.tamu.edu

Follow this and additional works at: <https://scholarship.law.tamu.edu/facscholar>



Part of the [Law Commons](#)

Recommended Citation

Andrew P. Morriss, *Review of Jesse Dukeminier and James E. Krier, Property (4th Edition 1998)*, 22 Seattle U. L. Rev. 997 (1998).

Available at: <https://scholarship.law.tamu.edu/facscholar/219>

This Article is brought to you for free and open access by Texas A&M Law Scholarship. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Texas A&M Law Scholarship. For more information, please contact aretteen@law.tamu.edu.

Review of Jesse Dukeminier and James E. Krier, *Property* (4th Edition 1998)

PROPERTY, 4th Edition. By Jesse Dukeminier[†] and James E. Krier.[‡]
New York, New York: Aspen Publishers, Inc., 1998. Pp. xiii,
1247.

*Reviewed by Andrew P. Morriss**

Professors Dukeminier and Krier's property casebook is reputed to be the market leader in Property casebooks; I have heard estimates that it has as much as a fifty percent market share. This position is well-deserved—the casebook is thorough, comprehensive, well-written, error free, and, a significant feature for new teachers, has the best teacher's manual I have encountered for any casebook in any subject. IBM once sold computers because "No one ever got fired for choosing IBM." An analogous claim can be made for this casebook—no one ever provoked significant faculty or student unrest by choosing Dukeminier and Krier.

In this review, I will concentrate on two perspectives on the book. I first taught *Property* in the spring 1998 semester (using the third edition of Dukeminier and Krier) and am (as I write this) about to begin my second year of teaching the course. I can thus give the perspective of a new teacher of the subject. In addition, I am an economist as well as a lawyer and am deeply fascinated by legal history. I try to bring both law and economics and historical perspectives to my teaching. I therefore offer an evaluation of the book with respect to its ambitions in those areas.

[†] Maxwell Professor of Law, University of California, Los Angeles.

[‡] Earl Warren DeLano Professor of Law, University of Michigan.

* Professor of Law & Associate Professor of Economics, Case Western Reserve University. B.A. 1981, Princeton; J.D., M.Pub.Aff. 1984, the University of Texas at Austin; Ph.D., Economics 1994, Massachusetts Institute of Technology. Thanks to my colleague, Juliet Kostritsky, for comments on this review, for recommending the Dukeminier and Krier casebook, and for generously sharing her thoughts and teaching materials during my first year of teaching *Property*.

I. COVERAGE

Dukeminier and Krier cover most aspects of property law in their comprehensive casebook. Regardless of whether a course is three hours, six hours, or somewhere in between, the book covers enough material to satisfy almost any curricular need. The twelve chapters and 1216 pages are divided into five sections entitled: *An Introduction to Some Fundamentals* (184 pp.), *The System of Estates (Leaseholds Aside)* (228 pp.), *Leaseholds: The Law of Landlord and Tenant* (130 pp.), *Transfers of Land* (192 pp.), and *Land-Use Controls* (478 pp.). As most courses can cover only a subset of this material, its easy divisibility is an important feature of the book. In my four-hour Property course, for example, I cover most of the first three sections and a small amount of material from the final section.¹

The material in each section is a mix of cases, note material, and problems. The cases are well-edited, concisely illustrating the relevant points while leaving enough of the cases that students must actually work to understand them. Editorial footnotes and notes explain details about the cases, often with a welcome touch of humor. A footnote to *Ghen v. Rich*,² a venerable whaling case, reassures the reader about the opinion's reference to attaching a "waif" to a whale carcass: "Worry not! To a whaler a 'waif' is not a homeless child but a pole with a little flag on top."³

The substance of the notes is wide-ranging and thought provoking. For example, after *Keeble v. Hickeringill*,⁴ an eighteenth-century English case concerning duck decoy ponds, a note on early English case reports explains the spotty nature of such reports.⁵ It then points out that *Pierson v. Post*,⁶ the famous fox hunting case that precedes *Keeble* in the casebook, relied on one of the less reliable reports of *Keeble* as authority and so misunderstood the rationale of *Keeble*.⁷ This provides an opportunity to discuss whether the *Pierson* court would have decided the case differently had it had an accurate report

1. The issues covered in the *Transfers of Land* section are covered in my school's upper class Real Estate Development course.

2. 8 F. 159 (D.C. Mass. 1881), reprinted in JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 26 (4th ed. 1998).

3. DUKEMINIER & KRIER, *supra* note 2, at 27 n.9.

4. 11 East 574, 103 Eng. Rep. 1127, 11 Mod. 74, 130, 3 Salk. 9 (Q.B. 707), reprinted in DUKEMINIER & KRIER, *supra* note 2, at 30.

5. DUKEMINIER & KRIER, *supra* note 2, at 33-34.

6. 3 Cai. R. 175, 2 Am. Dec. 264 (N.Y. S. Ct. 1805), reprinted in DUKEMINIER & KRIER, *supra* note 2, at 19.

7. DUKEMINIER & KRIER, *supra* note 2, at 33-34.

of *Keeble* available. The casebook authors conclude that it would not have.⁸ This is typical of the high quality of the casebook's supplemental material. The frequent problems also provide excellent teaching opportunities. Particularly in the section on estates in land, problems provide a welcome break from the case material.

Omitting material within sections is a straightforward process as well. Each chapter is relatively self-contained so that one can omit part of a section and still teach the remainder. Even within chapters, material can usually be omitted, although some lecturing may be required. Thus, the Rule Against Perpetuities and the Rule in *Shelley's Case* can be omitted from the chapter on Future Interests without difficulty.⁹

What is missing? If there is a fault in the coverage, it is that the book is so heavily focused on land that it misses the opportunity to tie property themes together by examining other areas. Aside from occasional note material and some of the introductory sections, for example, there is little material on water rights, intellectual property, or mineral rights. No property book could exhaustively survey those areas and remain under 100 pounds, of course, but some additional coverage would be helpful. There is certainly enough material here, however, for a thorough Property course of any length.

II. CHANGES IN THE FOURTH EDITION

Because Property is a relatively stable area of the law (unlike, for example, Constitutional Law), new editions of casebooks tend to refine the existing material rather than rethink the approach or introduce new material. Adjusting to a new edition is thus generally less painful for the faculty member than it would be if a new edition introduced numerous new cases and concepts. Moreover, because there are so many cases that illustrate each principle, the overlap in cases between books seems to me to be significantly lower than in other areas of the law. Aside from a few "classics" like *Pierson v. Post*, Property books often use different cases to cover the same principles. In contrast, Administrative Law casebooks generally all cover the same cases on the core constitutional questions.

Having switched books a great deal in my other courses in the search for the one best casebook for each subject, I know that switching books is extremely costly to the professor, even when the proportion of material from one's old notes that would survive the

8. *Id.*

9. I teach the former but not the latter; a colleague who also uses this casebook omits both.

transition is relatively high. For Property, this cost is even higher than in most subjects because it entails such large-scale change. There is thus a strong incentive to remain with one's current casebook choice through an edition change.

At least as far as I can tell from reviewing the portions of Dukeminier and Krier that I teach,¹⁰ the changes between the third and fourth editions are relatively minor. For example, in those chapters, the changes mostly involve slightly different editing of case materials and rearranging of note and problem material. The most significant changes I found were in Chapter 10 on covenants, easements, and servitudes, which was reorganized and expanded. For the most part, the changes make sense, although the flaws that they corrected were minor. The manner of introducing the changes is unnecessarily annoying, however. They are not flagged or explained in the teacher's manual. Discovering the changes in Chapter 10 during the usual end-of-the-semester crunch was a particularly unwelcome surprise. While some change for change's sake helps to prevent clogging of the mental arteries, a short section in the teacher's manual outlining the changes and giving even short explanations would be helpful in making the transition to new materials.¹¹ While the dominant current market share and high cost to the professor of adopting a new book perhaps make providing such material unnecessary to preserve sales, it would nonetheless be extremely helpful if publishers routinely provided it.

III. FOR THE NEW TEACHER

This is an excellent book in many respects for a teacher new to Property. The book's mixture of case law, note material, and problems gives you the opportunity to vary your teaching style within almost every class. The supplemental notes are complete and thorough, leaving few loose ends to track down in your own research. The teacher's manual, as previously noted, is excellent, providing suggested ways to approach particular sections, directions for further reading, and an excellent catalog of the authors' experiences in teaching the material.

10. This year those portions included chapters 1, 2, 3, 4, 5, 6, and 10.

11. For example, the fourth edition's version of *Moore v. Regents of the University of California*, 793 P.2d 479 (Cal. 1990), reprinted in DUKEMINIER & KRIER, *supra* note 2, at 66, omits the concurring and dissenting opinion by Justice Broussard that was part of the third edition. Compare DUKEMINIER & KRIER, *supra* note 2, at 66 (omitting concurring and dissenting opinion) with JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 69 (3d ed. 1993) (including the opinion).

Few student questions should surprise anyone who has carefully read the relevant sections of the teacher's manual.

The book's strengths can also be its weaknesses, however. The authors' voices are rarely heard above a murmured witty or informative aside. There is no strong point of view here. That is a blessing at times—property law is thoroughly and carefully set out, dissected, and patched back up, and one need not worry about the intrusion of a particular theoretical framework (such as law and economics, for example). It can also be frustrating.

In my case, for example, I generally prefer to use casebooks that present a point of view different from my own. As someone who believes strongly in the important role of property rights in securing a free society, I welcome regular challenges to that point of view in a casebook. I find that "teaching against" the book offers students the opportunity to have someone "on their side" in the classroom—either myself or the casebook authors. I am not seeking, of course, a casebook with whose principles I fundamentally disagree, but one that puts up more of a fight on particular issues.

For new teachers, a middle of the road approach in a casebook is attractive because it does not require the teacher to commit to a particular point of view on the material before working through the course. Moreover, because teaching a course is such a different experience from taking a course, everyone teaching Property (or any course) is experiencing the material for the first time in many regards. Nonetheless, the middle of the road approach hinders a new teacher from developing a point of view for several reasons. The new teacher is not forced to take a position with regard to the text's point of view, pro or con. More importantly, the new teacher is not offered an articulation of a position that he or she can then adopt. If a casebook offered, for example, a consistent series of feminist critiques of property law in the notes following the cases, one would have the opportunity to wrestle with those critiques on a regular basis.¹²

My ideal Property book's coverage does not differ all that greatly from Dukeminier and Krier except in one regard: I would happily trade the opening hundred pages of material of historical cases that raise foundational issues for a single case followed by discussions of different perspectives on that case (law and economics, feminist, critical

12. Of course, one could add a book of supplemental readings or include lecture material to supplement the material in whatever casebook one chooses. Adding readings, however, is hardly the answer in a course where one must already make countless cuts. Moreover, what is really needed is a consistent perspective, not supplemental readings.

race theory, sociological, etc.). Those perspectives could then be picked up throughout the book in short notes and provide a consistent set of frameworks for discussion in a way that assigning a supplemental reading from a smaller set of perspectives might not. To avoid work, I sometimes daydream about an electronic version of the casebook with icons representing the various perspectives appearing alongside the case material, allowing the student to access commentary on the case (or even the casebook itself) from representatives of different schools of thought.¹³

These types of concerns, of course, are more important to most of us as we plan a course than in the eighth week of a fourteen-week semester. At that point, the new teacher will be grateful for the high quality of the casebook and the exceptional teacher's manual. In many respects, these are criticisms aimed more at the casebook as a teaching device than at Dukeminier and Krier in particular, as no text, as far as I know, offers anything like what I have suggested. At the very least, however, casebooks need to offer some outside perspective on the law, and consistent economic and historical analyses seem particularly appropriate for property law.

IV. INTEGRATING LAW AND ECONOMICS AND HISTORY

As someone who thinks economics brings a great deal to the understanding of law in general and property law in particular, I was pleased to note the authors' opening statement that their book makes "a fairly systematic, but by no means dominating, attempt to critique [property law]—often through an economic lens."¹⁴ Similarly, the promised focus on history was encouraging. I was also pleased that the authors felt that they had presented the economics in a way that could be "managed easily . . . even by the totally uninitiated."¹⁵ Unfortunately, neither the history nor the economics are as fully integrated into the book as they could be. That this would be the case was signaled by Dukeminier and Krier's somewhat alarming closing comment that both the economic and historical perspectives they provide "can also be ignored or even scorned."¹⁶ While I imagine "scorn" is primarily a rhetorical flourish indicating that one can dispute the validity of particular conclusions based on either economics or history, ignoring

13. The reader concerned about what such daydreams suggest about my quality of life need not worry too much, as I also have more interesting, but less relevant, daydreams.

14. DUKEMINIER & KRIER, *supra* note 2, at xxxv.

15. *Id.*

16. *Id.*

such perspectives strikes me as problematic. A perspective that can be ignored is one that is not fully integrated into the book.

In many places in the book, commendably in my view, one cannot ignore either perspective (although scorn remains an option). The excellent estates in land chapters, for example, provide concise historical explanations for the circumstances surrounding the rise of the estates system. The introductory text in Chapter III thus relates both necessary context and some sense of the history of the role of the land estates in the struggle between kings and nobles that produced the common law. Moreover, it does so with the authors' characteristic flair for interesting details that illuminate the subject.¹⁷ Not only is the book easier to read as a result, but the students' interest is kept alive in what is admittedly one of the driest sets of legal rules around.

In other places, however, both historical context and economic analysis are largely absent, even when they would significantly illuminate the case material. For example, the introductory chapter closes with *New Jersey v. Shack*,¹⁸ a fascinating, if atypical, New Jersey Supreme Court decision that addressed property owners' right to exclude.

In *Shack*, a field worker for a federally-funded health services program for migrant workers, Frank Tejas, and a legal services attorney for a federally-funded legal aid organization, Peter Shack, entered the property of a New Jersey farmer named Tedesco.¹⁹ Against Tedesco's express orders, Tejas and Shack wanted to meet with migrant farmworkers living temporarily in housing provided by Tedesco.²⁰ Tedesco insisted that any meeting with the farmworkers be conducted in his office and in his presence.²¹ Tejas and Shack refused to agree to his conditions and also refused to leave the property.²² Tedesco summoned the New Jersey State Police and insisted that Tejas and Shack be arrested and charged with criminal trespass.²³ Both were convicted at trial in which Tedesco paid for the

17. See, e.g., DUKEMINIER & KRIER, *supra* note 2, at 208-09 (relating William Shakespeare's attempts to create a male dynasty).

18. 277 A.2d 369 (N.J. 1971), *reprinted in* DUKEMINIER & KRIER, *supra* note 2, at 87.

19. Perhaps as a sign of the New Jersey court's scorn, the opinion never identifies Tedesco's first name. See *id.*

20. *Id.* at 370 *reprinted in* DUKEMINIER & KRIER, *supra* note 2, at 87.

21. *Id.*, *reprinted in* DUKEMINIER & KRIER, *supra* note 2, at 88.

22. *Id.*, *reprinted in* DUKEMINIER & KRIER, *supra* note 2, at 87.

23. *Id.* at 371, *reprinted in* DUKEMINIER & KRIER, *supra* note 2, at 89.

lawyer prosecuting the case.²⁴ Both defendants appealed.²⁵ No one appeared to defend the convictions in the state supreme court.²⁶

In response, the New Jersey Supreme Court wrote a broad and sweeping opinion, filled with statements such as "Property rights serve human values Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises"²⁷ and "We see no profit in trying to decide upon a conventional category and then forcing the present subject into it."²⁸

Surprisingly, Dukeminier and Krier's treatment of *Shack* focuses on Professor Joseph W. Singer's analysis of the case as illustrative of his theory of the "reliance interest" in property.²⁹ What is puzzling about this focus is that Dukeminier and Krier (thankfully, in my opinion) do not continue it throughout the book. Because Singer's critique of traditional property law is not consistently presented (as it is in his own casebook), its prominent place in the introductory chapter serves primarily to confuse students.

Instead of centering their analysis on Singer's theory, Dukeminier and Krier might have adopted alternative approaches. For example, the historical context provides one way to evaluate some of the questions raised by *Shack*. The history of the disputes between migrant services workers and farmers puts Tedesco's behavior into a more understandable context. The tepid (at best) response of other courts to *Shack* puts the impact and the decisionmaking process into a clearer relationship to the common law of property. *Shack* is an outlier—its value as a teaching tool is precisely that. By presenting it without that context at the start of the course, however, students may well draw incorrect inferences. For example, they may conclude that courts can remove any "stick" from the property rights bundle without regard to the consequences. This only encourages what Richard Markovits has correctly identified as a decline in legal argument caused

24. 277 A.2d at 370, *reprinted in* DUKEMINIER & KRIER, *supra* note 2, at 88.

25. *Id.*, *reprinted in* DUKEMINIER & KRIER, *supra* note 2, at 88.

26. *Id.*, *reprinted in* DUKEMINIER & KRIER, *supra* note 2, at 88.

27. *Id.* at 372, *reprinted in* DUKEMINIER & KRIER, *supra* note 2, at 90.

28. *Id.* at 374, *reprinted in* DUKEMINIER & KRIER, *supra* note 2, at 92.

29. DUKEMINIER & KRIER, *supra* note 2, at 94-95. See Joseph W. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988). Briefly, Singer argues that once owners grant access to their property, they are not unconditionally free to revoke it. In addition, creating a relationship of muted dependence, including joint efforts, may require redistribution of property rights when the relationship ends. Finally, nonowners may have a right to others' property to fulfill needs of the more vulnerable persons. DUKEMINIER & KRIER, *supra* note 2, at 94-95 (citing Singer, *supra* note 29, at 699).

in part by the substitution of poor quality policy analysis for traditional legal argument.³⁰

Shack is a case that is, I think, virtually meaningless outside its historical and economic context. In terms of the modern view of property rights as akin to a bundle of sticks from which specific rights or "sticks" can be removed, *Shack* removes one of the most fundamental—the right to exclude. Other courts have not rushed to follow *Shack*, and I question whether the case accurately expresses even a significant minority view of limits on the right to exclude. As a statement of doctrine, it is thus not particularly useful. Its purpose in a casebook, therefore, must be to challenge students to consider whether there are limits, and what those limits might be, on judicial redefinition of property rights. To do so, however, context is vital.

A. History

The full historical context of *Shack* is not present in the opinion. Migrant farm workers are undoubtedly among the poorest segments of our society, if not *the* poorest segment. It is difficult to imagine a group of people with fewer resources, fewer opportunities, or a smaller chance of escape from a truly dreadful lifestyle. At the start of my legal career, I practiced briefly in a migrant legal program in a particularly politically and racially polarized area and observed first hand the plight of migrant workers almost twenty years after *Shack*.³¹ The opinion's excerpts convey some of the economic plight of the farmworkers, but provide none of the political context.

The fact that there are two sides to the story in *Shack*, something it took me several years to realize, is also absent from the opinion.

30. RICHARD S. MARKOVITS, MATTERS OF PRINCIPLE: LEGITIMATE LEGAL ARGUMENT AND CONSTITUTIONAL INTERPRETATION 6-7 (1998) (arguing quality of legal argument taught in law schools has declined over past several decades).

31. Readers seeking more detail on the plight of farm workers should consult the voluminous writings of Professor Marc Linder of University of Iowa Law School, who is the national academic authority on migrant and seasonal agricultural workers and their legal problems. His works appear in both law reviews and as books with astonishing regularity and equally astonishing quality. I often disagree with his conclusions, but no one has written with more passion, more insight, or more effectiveness about the legal system and those at the bottom of the labor market. See, e.g., Marc Linder, *Crewleaders and Agricultural Sweatshops: The Lawful and Unlawful Exploitation of Migrant Farmworkers*, 23 CREIGHTON L. REV. 213 (1989-1990); Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335 (1987); Laurence E. Norton II and Marc Linder, *Down and Out in Weslaco, Texas and Washington, D.C.: Race-Based Discrimination Against Farm Workers Under Federal Unemployment Insurance*, 29 U. MICH. J.L. REFORM 177 (1995).

Farmers like Mr. Tedesco³² feared the migrant programs because they believed (and many undoubtedly still believe) that such programs took their tax dollars and devoted those dollars to paying snotty young lawyers from elite law schools to destroy the farmers' way of life.³³

In large part, the farmers were right. The point of the migrant programs and the federal laws that they enforce was (and is) to force a change in how migrant and seasonal agricultural workers are treated and thus to force changes in work practices and, ultimately, to redistribute income to (at least some) migrant workers from (at least some) farmers. Moreover, migrant programs were, at least in my experience, largely staffed by lawyers from elite law schools. The office I worked in, for example, was originally founded by a group of Harvard Law School students who had written the proposal for the office as a law school project. Although by the time I joined the staff the program had begun to hire people (like me) who were not from elite law schools, we were still a pretty snotty bunch, at least with respect to our presumed moral superiority to the folks on the other side.

Allowing workers from such programs onto one's land, therefore, was not simply a matter of resisting benevolent social programs, as the opinion in *Shack* suggests. To farmers like Tedesco, it undoubtedly appeared as if emissaries of satanic forces, if not the Devil himself, were seeking to enter their land. Restricting the right to exclude here had serious consequences for Tedesco and for his "reliance interest" in his property rights. The note materials' focus on the farm workers' interests fails to address this. Tedesco and farmers like him may have been wrong in how they treated their workers, but the take-no-prisoners approach both farmers and activists practiced in these situations tended not to lead to any greater understanding of the legitimate concerns of the other camp.

Moreover, *Shack* raises serious questions about the authority a court has to redefine core common law rights.³⁴ The excerpt of *Shack* in the casebook cites almost no authority for the New Jersey court's sweeping action—and neither does the full opinion. Modern common

32. In my experience many farmers are themselves little more than hired hands of the large packing sheds that control production—dictating details of operations such as which fields will be planted, the timing of the harvest, and the type of seed used. Farming practices vary by crop, of course.

33. See *Howard Gault Co. v. Tex. Rural Legal Aid, Inc.*, 615 F. Supp. 916, 922-28 (N.D. Tex. 1985) (setting out the political and social context of a farm labor dispute).

34. See Andrew P. Morriss, *Right Answers and Codification*, __ CHI-KENT L. REV. __ (forthcoming 1999).

law courts often appear to feel free to change the law because they believe that change is a good thing. In the past, common law courts appeared to interpret the structure of the common law as a more serious constraint. What exactly does it mean, for example, for a court to say that "[p]roperty rights serve human values?"³⁵ Does such a statement provide authority for courts to redefine property rights at will? Or are there limits to the courts' authority to do so? Where do such limits come from? I think all these are important questions raised by *Shack* and, put into context, *Shack* is an excellent vehicle for discussion.

B. Economics

Economic analysis brings two things to the examination of *Shack*: an analysis of the incentives created by *Shack* and a broader analysis of the role of restrictions on property rights. Legal rules create incentives for individual behavior in many ways. Farmers like Tedesco will probably be less likely to keep legal aid workers off their farms by calling the police, but they may have other alternatives. Legal process is a substitute for violence, and removing the protection of trespass law may make threatened or actual violence more attractive.³⁶ The loss of trespass protection may also encourage less extreme behavior.

Thus, one can approach the issue of incentives by asking how an attorney would advise a similarly situated farmer who desired to prevent migrant services organizations from reaching his employees. The first step would be to eliminate the housing services, leaving the workers to find their own housing. Not only would this end the trespass problem from the farmer's point of view, it would likely disperse the employees among a wide range of poor quality alternatives, many of which would be inferior to even the low quality housing previously available. Workers might, for example, end up living in their cars while in the area. A mutually beneficial private arrangement between the workers and farmers would therefore be converted into an externality, imposing costs on both the workers (reduced housing options) and the public (increased use of public spaces for living space by migrants). All too often, lawyers assume that passing a law will lead to compliance when individuals have significantly broader options that may prevent the desired end.

35. 277 A.2d at 372, reprinted in DUKEMINIER & KRIER, *supra* note 2, at 90.

36. See generally JOHN R. UMBECK, A THEORY OF PROPERTY RIGHTS WITH APPLICATION TO THE CALIFORNIA GOLD RUSH (1981).

Economics can do more than explain the incentives created by legal rules. It can also offer insights into the reasons for the rules. For example, how do we explain the shift from commonly owned property to private property rights? Earlier in Chapter 1, Dukeminier and Krier raise some of these issues through an excerpt from Harold Demsetz' analysis of externalities to explain this shift among some, but not all, groups of indigenous peoples in North America.³⁷ When we come to *Shack*, however, the economics disappears just when it might be significantly enlightening.

One reason for this is Dukeminier and Krier's primary reliance on only a subset of the economics of property rights, one of the most important recent developments in economic theory. They discuss externalities for example, but pay little attention to the new, expanded approach to the economic analysis of the definition of property rights. Although Dukeminier and Krier cite some of this broader work in notes, they rarely incorporate it into the text or excerpt it.³⁸ This work suggests that the definition of property rights is at least strongly related to the costs and benefits of defining property rights in different circumstances.³⁹ Thus, for example, the property rights conferred on the holder of a ticket to a movie at a theater are usually the right to occupy a seat during a specified performance, subject to various conditions (not engaging in disruptive behavior, etc.). On the other hand, the property rights conferred on a holder of a ticket to a professional sports event or theater performance are usually the right to occupy a *specified* seat during a specified performance, again subject to various conditions. Indeed, the rise of "personal seat licenses" in new sports stadiums suggests that property rights definition can be extended even to the creation of a property rights in the opportunity to purchase a specified seat.

37. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (Pap. & Proc. 1967), reprinted in DUKEMINIER & KRIER, *supra* note 2, at 40.

38. See, e.g., DUKEMINIER & KRIER, *supra* note 2, at 59 (citing but not discussing UMBECK, *supra* note 36, and Terry L. Anderson and P.J. Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J. L. & ECON. 163 (1975)).

39. See, e.g., YORAM BARZEL, *ECONOMIC ANALYSIS OF PROPERTY RIGHTS* (1989). People can affect rights delineation, and as part of their maximization effort people can delineate rights to whatever degree they desire. In this sense, rights are always well delineated. Because commodities are not uniform and are costly to measure, however, perfect delineation is prohibitively costly, and so rights are never perfectly delineated.

Id. at 114. This is part of the point of Demsetz' analysis, but Dukeminier and Krier's excerpt and surrounding text concentrates on the idea of externalities instead. DUKEMINIER & KRIER, *supra* note 2, at 40-59.

The relative costs and benefits of redefining the rights can explain the difference. Theaters and sports stadiums must employ ushers to resolve disputes over seating, issue numbered tickets, develop formulas for pricing, and so forth. Movie theaters need not. A good seat at a sporting event or play, however, is worth considerably more relative to a less desirable seat than a good seat at a movie theater is relative to a less desirable seat. This theory thus explains the reason why some entities are willing to invest in the necessary personnel and equipment to create more well-defined property rights while others are not.

More importantly, property rights economics offers an alternative explanation for the rise of property rights that can have little to do with the definition of those rights by State authorities. As Yoram Barzel notes in his contribution to the Cambridge University Press *Political Economy of Institutions and Decisions* series:

Legal rights, as a rule, enhance economic rights, but the former are neither necessary nor sufficient for the existence of the latter. The rights people have over assets (including themselves and other people) are not constant; they are a function of their own direct efforts at protection, of other people's capture attempts, and of government protection.⁴⁰

Applying this to the situation in *Shack*, we can tell a story significantly different from the casebook's emphasis on the Singer-reliance interest theory.

First we must recognize that landowners' rights are not simply a function of what the State, whether legislatively or judicially, says they are.⁴¹ Private actors play a significant role in defining property rights through their investment in those rights' creation and protection. Thus, in *Shack*, Tedesco invested some resources in defining the right to exclude as a part of the land owner's property rights through his call to the New Jersey State Police and his funding of the attorney to prosecute the trespass charges at trial. Perhaps mistaken or unaware that the cost of abandoning the issue might include a lost right to exclude permanently, he then stopped investing in the case. The defendants, however, had a much stronger interest (gaining access, removing the convictions from their records), lower costs (federal

40. BARZEL, *supra* note 39, at 2.

41. See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991) (the classic on private ordering of rights); Andrew P. Morriss, *Miners, Vigilantes & Cattlemen: Overcoming Free Rider Problems in the Private Provision of Law*, 33 *LAND & WATER L. REV.* 581 (1998) (describing private creation of property rights in the nineteenth-century American West).

funding) and, perhaps, a much more accurate reading on the potential before the New Jersey Supreme Court. The defendants invested their resources in redefining the property rights to control access as property rights in the tenants. The landowner then had the option of reclaiming his property rights by excluding the tenants. One can then add to this an economic analysis of the role of the migrant services organizations, discussion of the attorney-client relationship in circumstances where the client does not have influence over the attorney's compensation, and so forth.

My critique of the authors' treatment of *Shack* is not meant to detract from my appreciation of their impressive effort to provide a roadmap to the historical and economic literature on property rights or to present those perspectives throughout the book. Anyone interested in pursuing either historical or economic analysis of property rights will find extensive resources throughout the note material. Even better for faculty, the teacher's manual summarizes key points from many of the cited sources.

Casebook authors must make tradeoffs in structuring their books, and more history or economics would require less material elsewhere; it may be that market dynamics, book size, and so forth dictate the approach taken rather than the alternatives suggested here. Nonetheless, as strong as those materials are, their integration into the fabric of the book remains unsatisfying.

Professor Robert G. Natelson of the University of Montana School of Law introduces his materials for property, which he has generously shared with me, by noting that

law professors and law students often commit opposite errors in discussing legal education. Many professors assume that real-world exposure is unnecessary for teaching law and learning law. Many students assume that background social science and a knowledge of overall principles (legal theory) are unnecessary.

But learning the realities of practice requires both real-world exposure and a firm grasp of the legal context—legal principles and how they work in society. Just as teachers need to know practice, lawyers need to know theory. The lawyer who cannot understand theory—and here I mean empirically-based theory—is not a good lawyer.⁴²

While Natelson's comments are true of all law teaching, they are especially important for property. Property law is nothing if not

42. ROBERT G. NATELSON, *REAL PROPERTY* v (3d ed. 1997) (unpublished materials on file with author).

historically based, and property rights are critical parts of the market economy: understanding the exciting work done in recent years in both these areas is thus particularly important.

V. CONCLUSION

Dukeminier and Krier's casebook is a strong book in most respects, and a truly excellent one in many. While I may eventually prefer a casebook that more fully integrates history and economic analysis (assuming one exists), teaching from this book has been, and likely will continue to be for years to come, a marvelous experience for me and, I hope, my students. The teacher's manual stands as an example to all casebook authors; the clarity and thoroughness of the text make challenging new preparation significantly easier. Dukeminier and Krier's casebook is a clear winner.

